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Nos. 00-596 and 00-597

In the Supreme Court of the United States

LORILLARD TOBACCO CO., ET AL., PETITIONERS

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS

ALTADIS U.S.A. INC., ETC., ET AL., PETITIONERS

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether state regulations that restrict the advertising of tobacco products near a school or playground are preempted by the Federal Cigarette Labeling and Advertising Act.

2. Whether such regulations violate the First Amendment.

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in the resolution of the question whether state regulations that restrict the advertising of tobacco products near a school or playground are preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA), 15 U.S.C. 1331 *et seq.* The Attorney General is responsible for enforcing FCLAA, 15 U.S.C. 1339. In addition, FCLAA preserves the authority of the Federal Trade Commission (FTC) with respect to unfair or deceptive advertising of cigarettes, see 15 U.S.C. 1336, and it requires the Secretary of Health and Human Services (HHS) and the FTC to submit annual reports to Congress concerning the health consequences of smoking and current practices of cigarette advertising, see 15 U.S.C. 1337. The

Secretary of HHS also administers a program to inform the public about any dangers to human health presented by smoking and to maintain liaison with state and local agencies in those efforts. See 15 U.S.C. 1341. Pursuant to 42 U.S.C. 300x-26, the Secretary also makes block grants for prevention and treatment of substance abuse that are conditioned on the States' taking appropriate steps to reduce the availability of tobacco products to minors.

The United States also has an interest in the question whether restrictions on the advertising of tobacco products near a school or playground violate the First Amendment. Federal law places important restrictions on commercial speech that threatens public health and safety, including commercial speech concerning tobacco products. 15 U.S.C. 1335 (unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission); 15 U.S.C. 1336 (preserving FTC's authority over unfair or deceptive practices in cigarette advertising); 21 U.S.C. 343(r) (1994 & Supp. IV 1998) (authorizing Food and Drug Administration (FDA) to restrict labeling claims about nutrients).

STATEMENT

1. The Attorney General of Massachusetts has promulgated regulations that restrict advertising of tobacco products near a school or playground. Specifically, the regulations prohibit "[o]utdoor advertising [of tobacco products], including advertising in enclosed stadiums and advertising from within a retail establishment that is directed toward or visible from the outside of the establishment, in any location that is within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school." Mass. Regs. Code tit. 940, § 21.04(5)(a) (2001). The regulations also prohibit interior store advertising of cigarettes or smokeless tobacco products within the 1000 foot zones unless the signs are placed more than five

feet from the floor or the store is an adult-only establishment. § 21.04(5)(b). The Attorney General has declared each of those practices to be "unfair or deceptive acts or practices" within the meaning of chapter 93A, § 2(a) of the Massachusetts General Laws because they induce children to use tobacco products. Mass. Regs. Code tit. 940, § 21.01 (2001).[1]

Tobacco manufacturers (petitioners) filed suit against the Attorney General of Massachusetts (the State), alleging that the State's outdoor and interior store advertising restrictions are preempted by FCLAA and violate the First Amendment. Pet. App. 6a. FCLAA's preemption provision specifies that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. 1334(b).

The district court held that the State's advertising restrictions are not preempted by FCLAA. The court reasoned that the regulations are not "based on smoking and health" within the meaning of FCLAA's preemption provision because they are based on the location of the advertising and not on what the advertising communicates about the relationship between smoking and health. Pet. App. 52a-57a. The district court also held that the State's outdoor advertising restriction does not violate the First Amendment. Applying the analysis set forth in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), the district court determined that the restriction directly

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[1] The regulations permit a retailer to "place one sign no larger than 576 square inches and containing only black text on a white background stating 'Tobacco Products Sold Here' on the outside or visible from the outside of each location where such products are offered for sale." Mass. Regs. Code tit. 940, § 21.04(6) (2001). The district court invalidated that provision. Pet. App. 57a. No appeal was taken from that aspect of the district court's ruling, and the validity of that provision is not at issue here.

serves the State's substantial interest in preventing underage tobacco use and is not more extensive than necessary. Pet. App. 68a-83a. The court invalidated the interior store advertising restriction, finding it more extensive than necessary. *Id.* at 82a-83a.

The court of appeals affirmed in part and reversed in part. Pet. App. 1a-45a. The court held that the advertising restrictions are not preempted by FCLAA because they are not prohibitions "with respect to * * * advertising" within the meaning of Section 1334. *Id.* at 9a-13a. The court reasoned that restrictions on advertising location "do not interfere with the cigarette and smokeless tobacco labeling and advertising scheme established by Congress," *id.* at 12a-13a, and that interpreting the phrase "with respect to * * * advertising" to encompass such restrictions would amount to "uncritical literalism," *id.* at 13a n.7.

Applying the *Central Hudson* analysis, the court of appeals also held that the State's advertising restrictions do not violate the First Amendment. Pet. App. 14a-35a. The court concluded that the State has substantial interests in preventing unlawful sales of tobacco to minors and in protecting the health of minors from the adverse effects of tobacco use. *Id.* at 18a. The court also determined that the State had shown that there is a direct link between tobacco advertising and underage tobacco use and that limits on advertising near schools and playgrounds would serve the State's interests in curbing underage use to a material degree. *Id.* at 21a-29a. Finally, the court concluded that the State's restrictions are not more extensive than necessary, *id.* at 29a-35a, emphasizing that the restrictions are limited to those areas where children are most likely to be affected by tobacco advertising, *id.* at 30a-31a.

SUMMARY OF ARGUMENT

I. The purpose of Congress is the ultimate touchstone of preemption. Preemption analysis under FCLAA nonetheless

is with an assumption that Congress did not intend to preempt the historic police powers of the States. Two fields of traditional state authority are implicated here—the State's authority to regulate the location of advertising and its authority to protect the health and welfare of children from an addictive and dangerous product.

FCLAA does not reflect any purpose by Congress to preempt advertising location restrictions like those at issue here. FCLAA's preemption provision reaches only requirements or prohibitions that are "based on smoking and health." The restrictions at issue here are "based on" the location of the advertising; they are not "based on smoking and health." Congress used the phrase "based on smoking and health" to limit the scope of preemption to regulations that require or prevent the advertisement of a message concerning the relationship between smoking and health. Because the restrictions at issue here apply without regard to the message of the advertising, they are not preempted.

That conclusion is especially evident when FCLAA is viewed as a whole. When Congress amended the preemption provision to its current form, it both reestablished federal warning requirements for cigarette labels and preserved the FTC's authority to require warnings in advertising. The preemption provision is best understood as displacing state regulations that could interfere with that federal warning program—such as those that require or prohibit health messages in labeling or advertising. State restrictions on the location of advertising, however, do not interfere with federal warning requirements. They are therefore not preempted.

FCLAA's declaration of purpose confirms that Congress's intent was to establish uniform health warning requirements and to displace conflicting and diverse state requirements in that area. Congress expressed no intent to displace a State's traditional authority to decide where advertising may be located within its borders.

II. The State's restrictions on advertising near schools and playgrounds satisfy the established standards for evaluating the constitutionality of restrictions on commercial speech. See *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n*, 447 U.S. 557 (1980). The State's interests in preventing unlawful distribution of tobacco products to minors and protecting minors from the health consequences of smoking are compelling. The nicotine in tobacco is extraordinarily addictive, and one out of three children who becomes addicted will eventually die from a tobacco-related disease.

The State's restrictions on advertising are also directly and materially related to preventing underage tobacco use. Evidence shows that tobacco advertising (1) creates an environment of "friendly familiarity" in which children view smoking as pervasive and acceptable, (2) seduces vulnerable children through techniques that associate smoking with excitement, glamour, and independence, and (3) leads children who lack maturity in judgment to underestimate the addictive power and health risks of tobacco products.

By placing restrictions on advertising within 1000 feet of schools and playgrounds, the State has carefully tailored its restrictions to the areas where children are most likely to be repeatedly and unavoidably exposed to tobacco advertising. The State's restrictions also leave petitioners with ample opportunities to convey information about their products to adults, such as through outdoor advertising outside the school and playground zones, and through newspapers, magazines, direct mail, and personal solicitation. More aggressive enforcement of the laws that prevent sale of tobacco products to children can only accomplish so much. Advertising restrictions are necessary to complement enforcement efforts because they attack a dimension of the problem that enforcement efforts do not address—the demand for tobacco that advertising creates and nourishes in minors.

The Court should reject petitioners' proposal to apply strict scrutiny to what they assert are content or viewpoint based restrictions on commercial speech. *Central Hudson*'s middle-tier scrutiny strikes the appropriate balance between a seller's interest in proposing a commercial transaction and the State's right to regulate speech that is intimately bound up with economic activity. Moreover, the restrictions at issue here are directly related to preservation of a fair bargaining process. The State justifiably views any bargain between tobacco manufacturers and children as inherently unfair, both because the State has made the sale of tobacco products to children unlawful, and because so many children lack the maturity in judgment to resist the tobacco industry's appeals to excitement, glamour, and independence, and to appreciate the addictive power and health risks of tobacco products.

ARGUMENT

I. THE STATE'S RESTRICTIONS ON ADVERTISING NEAR SCHOOLS AND PLAYGROUNDS ARE NOT PREEMPTED BY FCLAA

FCLAA's preemption provision specifies that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. 1334(b). As the courts below concluded, that provision does not preempt state regulations that restrict the location —as distinguished from the content—of advertising.

A. When this Court considered the scope of FCLAA's preemption provision in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), it stressed that "[t]he purpose of Congress is the ultimate touchstone." *Id.* at 518 (internal quotation and citation omitted). But the Court "start[ed] with the assumption," that because Congress had legislated "in a field which the States have traditionally occupied," "the historic police

powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); see 505 U.S. at 516 (quoting *Rice*); see also *Medtronic* v. *Lohr*, 518 U.S. 470, 485 (1996). Two fields of traditional state authority are directly implicated here—regulating the location of advertising and the protection of the health and welfare of children.

This Court recognized both of those traditional state interests in *Packer Corp.* v. *Utah*, 285 U.S. 105 (1932). In that case, the Court rejected an equal protection challenge to a state law that prohibited billboard advertising of tobacco products, but did not prohibit tobacco advertising in newspapers, magazines, or periodicals. The Court explained that it had been the State's "persistent policy" to prevent the use of tobacco by minors and that the restriction on billboard advertising of tobacco products furthered that policy. *Id.* at 108-109. The Court also noted that the message on billboards, unlike that in newspapers or periodicals, is "thrust upon" young people as well as adults with "all the arts and devices that skill can produce," "without the exercise of choice or volition" on the part of the viewer. *Id.* at 110. The Court also rejected a Commerce Clause challenge to the law, explaining that the restriction on billboard advertising fell within the scope of the State's police power because it dealt with a form of advertising that is "essentially local." *Id.* at 112.

Against that background, preemption analysis must start with the assumption that, in enacting FCLAA in 1965 and amending it in 1970, Congress did not intend to displace state advertising restrictions like those at issue here. Like the Utah billboard law upheld in *Packer Corp.*, the regulations at issue here restrict only the location of tobacco advertising within the State, and therefore address an "essentially local" problem that does not implicate the purpose of FCLAA to protect national commerce from a diver-

sity of state laws concerning the content of cigarette advertising with respect to smoking and health. See pp. 13-14, *infra*. Furthermore, like the billboard law in *Packer Corp.*, the Massachusetts regulations restrict advertising in order to help curb underage tobacco use.

FCLAA does not reflect any purpose by Congress to preempt such advertising location restrictions. That conclusion follows from a close examination of the text of the FCLAA preemption provision itself and from FCLAA's purpose to specify the text of required health warnings in cigarette labels and advertising.

B. FCLAA's preemption provision reaches only prohibitions or requirements that are "based on smoking and health." The restrictions at issue here are "based on" the location of the advertising; they are not "based on smoking and health" as those terms are used in 15 U.S.C. 1334(b). See *Penn Adver. of Baltimore, Inc.* v. *Mayor & City Council*, 63 F.3d 1318 (4th Cir. 1995), vacated and remanded on other grounds, 518 U.S. 1030, readopted and modified on remand, 101 F.3d 332 (4th Cir. 1996), cert. denied, 520 U.S. 1204 (1997).

In barring any "requirement or prohibition based on smoking and health," Section 1334(b) bars the States from imposing any requirement or prohibition that *operates on the basis of* smoking and health. The Massachusetts regulations challenged here, by contrast, operate on the basis of, and with specific reference to, the location of the advertising, not its content. The regulations neither require petitioners to mention, nor prohibit petitioners from mentioning, any relationship between smoking or health in their advertising. Indeed, they do not even impose any duty on petitioners that requires them to consider any relationship between smoking and health in order to comply. In short, the Massachusetts regulations operate *irrespective* of any relationship between smoking and health.

Petitioners argued below (see Pet. App. 53a) that the State's restrictions are "based on smoking and health" because concerns about the health consequences of smoking motivated the State to adopt them. The text of Section 1334(b) substantially undermines the notion that preemption turns on the State's motive in imposing the restrictions, rather than on the character of the restriction. Again, Section 1334(b) provides that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes" that are properly labeled under FCLAA. It is clear from the structure of the sentence that the phrase "based on smoking and health" modifies "requirement or prohibition," not "imposed." The phrase is therefore most naturally read as referring to the objective character of the requirement or prohibition itself, not the subjective reasons of the State for imposing it. If Congress had intended to require an inquiry into motive, it would have located the phrase referring to smoking and health so that it modified "imposed" rather than "requirement or prohibition," and probably would have used words other than "based upon" (such as "because of" or "on account of").[2]

By contrast, the wording Congress chose shows that it intended an objective inquiry, rather than a subjective one, and that the relevant question for purposes of preemption is whether the requirement or prohibition is itself written in terms of smoking and health. Thus, as the district court concluded, Section 1334(b) preempts any law that either "specifically requires or prevents the advertisement of a

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[2] For example, Congress in that event could have drafted Section 1334(b) to read: "No requirement or prohibition shall be imposed under State law, because of any relationship between smoking and health, with respect to the advertising or promotion of cigarettes." Compare *Personnel Adm'r* v. *Feeney*, 442 U.S. 256, 279 (1979) (purposeful discrimination shown only if State acted "because of," not "in spite of," adverse effects on an identifiable group).

message concerning the relationship between smoking and health." Pet. App. 57a. It does not reach restrictions that regulate the location of advertising.

Petitioners' suggested motivational interpretation also suffers from additional flaws. First, there is no reason to believe that Congress regarded state action taken because of concerns about the health consequences of smoking as inherently suspect, and designed Section 1334(b) to root out state action undertaken for that prohibited purpose in the same manner as a prohibition against state actions having a racially discriminatory purpose. To the contrary, Congress sought to encourage States to exercise their police powers to address the central public policy issues raised by the relationship between smoking and health. See p. 16, *infra*; see also 15 U.S.C. 1341(a)(3) and (5) (Secretary to maintain liaison with States respecting activities relating to smoking and health); 42 U.S.C. 300x-26 (block grants conditioned on States reducing availability of tobacco to minors).

Second, almost any requirement or prohibition that a State would be likely to impose specifically "with respect to the advertising or promotion of * * * cigarettes" would have as its underlying motivation a concern about the health consequences of smoking. Interpreting "based on smoking and health" to refer to the State's underlying motivation would therefore deprive that phrase of any significant limiting force. This Court has cautioned against interpreting a preemption provision in a manner that fails to give significant force to "words of limitation." *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 656 (1995). Petitioners' proposed interpretation suffers from that vice.[3]

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[3] Petitioners' interpretation is equally incongruous if we assume, arguendo, that some state or local governments would adopt particular restrictions on cigarette advertising for reasons other than a concern about the relationship between smoking and health. In that event, a restriction that was adopted in identical form by a number of state or local

Petitioners' contrary interpretation also would lead to startling consequences. Under petitioners' interpretation, a State could not bar tobacco advertising at school entrances or at little league fields. Congress did not intend such an unusual result.

C. The conclusion that location restrictions are not preempted is especially evident when FCLAA is viewed "as a whole." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). The core of FCLAA is 15 U.S.C. 1333's requirement that cigarette labels and advertising must carry specific warnings about the dangers of smoking. When Congress amended the preemption provision to its current form, it had not yet extended the federal warning requirements to advertising. It had, however, preserved FTC's authority to require warnings in advertising in order to prevent unfair and deceptive advertising practices. *Cipollone*, 505 U.S. at 514-515 (1992).[4] Having established federal warning requirements in Section 1333 for cigarette labels and having preserved FTC's authority to require federal warnings in advertising, Congress amended Section 1334 to preempt state regulations that could interfere with those federal warning requirements. State law restrictions that

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governments and applied irrespective of the presence or absence of any message in the advertising concerning the relationship between smoking and health would be valid in some of those jurisdictions and invalid in others, depending upon the underlying motivation of each governmental entity. There is no reason to believe that Congress intended such a cumbersome inquiry and uneven result under a preemption provision that was designed to ensure national uniformity in the narrow field in which it operates. See pp. 13-14, *infra*.

[4] Congress amended FCLAA in 1984 to prescribe specific warnings in advertising, including billboard advertising. See Pub. L. No. 98-474, § 4(a), 98 Stat. 2201; 15 U.S.C. 1333(a)(2) and (3), (b)(2) and (3). Those same amendments also revised the warnings on cigarette packages, replacing a single warning with four warnings to appear on a rotating basis. See 15 U.S.C. 1333(a)(1).

either require or prohibit health messages in labeling or advertising meet that description.

Congress did not, however, establish any federal requirements on where billboard and other advertising could be located within a State. Its failure to do so is not surprising. Deciding where advertising may be located within a State is a peculiarly local function. See p. 8, *supra*. Having failed to establish any federal requirements on the subject, it is most unlikely that Congress intended through a general preemption provision to supersede the State's traditional authority in that area. Because state *location* restrictions could not interfere with federal *warning* requirements, Congress had no reason to preempt them. And because ordinary field and conflict preemption principles thus would not suggest that location restrictions are invalid, there is no reason why Section 1334(b) should be construed to require that surprising result. See *Medtronic*, 518 U.S. at 500 (construing a general preemption provision to apply only "where a particular state requirement threatens to interfere with a specific federal interest"); See also *California Div. of Labor Standards Enforcement* v. *Dillingham Constr.*, 519 U.S. 316, 336 (1997) (Scalia, J., concurring) (ERISA's preemption provision should be construed to embody ordinary field and conflict preemption principles); accord *Egelhoff* v. *Egelhoff*, No. 99-1529 (Mar. 21, 2001), slip op. 1 (Scalia, J., concurring); *id.* at 1 (Breyer, J., dissenting).

D. FCLAA's "declaration of policy and purpose" in 15 U.S.C. 1331 confirms that Congress intended to preempt only state restrictions that would create a lack of uniformity in the health messages required or prohibited in labeling and advertising. Section 1331 begins by stating that Congress's purpose in FCLAA is "to establish a comprehensive Federal Program to deal with cigarette labeling and *advertising with respect to any relationship between smoking and health.*" 15 U.S.C. 1331 (emphasis added). It then states that the comprehensive program that FCLAA establishes is one

whereby "the public may be adequately *informed* about any adverse health effects of cigarette smoking by *inclusion of warning notices* on each package of cigarettes and in each advertisement of cigarettes." 15 U.S.C. 1331(1) (emphasis added). Those statutory declarations demonstrate that Congress's purpose was to establish uniform federal requirements concerning statements in either labeling or advertising about the adverse health effects of smoking. There is no indication in those declarations that Congress had the far broader intent to prevent state and local governments from exercising their traditional authority to determine where tobacco advertising may be placed.

Subsection (2) similarly expresses Congress's purpose that the comprehensive federal program it established is one whereby "commerce and the national economy may be * * * not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to *any relationship between smoking and health*." 15 U.S.C. 1331(2)(B) (emphasis added). That declaration confirms that Congress viewed as a threat to the federal program only the potential for diversity in state regulation that addresses "any relationship between smoking and health"—*i.e.*, health message regulations. Diverse state requirements on where tobacco advertising may be located do not pose such a threat.

Indeed, "[d]ivergent local zoning restrictions on the location of sign advertising are a commonplace feature of the national landscape and cigarette advertisers have always been bound to observe them." *Greater N.Y. Metro. Food Council, Inc.* v. *Giuliani*, 195 F.3d 100, 109 (2d Cir. 1999), cert. denied, 529 U.S. 1066 (2000). Those generally applicable zoning restrictions are not even arguably preempted by Section 1334(b). Thus, regardless of the outcome in this case, a cigarette advertiser would still be required to "ascertain where it can permissibly advertise in light of diverse local zoning ordinances." *Ibid.* In terms of the

policies Congress sought to advance, there is no reason to treat tobacco-specific location restrictions any differently.

E. The evolution of FCLAA's preemption provision also shows that it encompasses only state laws that affect the health messages contained in cigarette advertising. When originally enacted in 1965, Section 1334(b) provided:

> No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

FCLAA, Pub. L. No. 89-92, § 5(b), 79 Stat. 283. As explained by the plurality in *Cipollone*, 505 U.S. at 518, the phrase "statement relating to smoking and health" "referred to the sort of warning provided for in [Section 1331] which set forth verbatim the warning Congress determined to be appropriate." That language therefore "only pre-empted state and federal rulemaking bodies from mandating particular cautionary statements." *Id.* at 519-520. Thus, the original version of Section 1334(b) did not preempt state regulations that affect only the placement of advertisements.

Congress amended Section 1334(b) in 1970, Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 2m, 84 Stat. 88, and that amendment expanded the scope of the preemption provision in certain respects. As amended, Section 1334(b) now encompasses "prohibitions" as well as "requirements," and it encompasses regulations "with respect to advertising," not just regulations concerning what is "in the advertising." *Cipollone*, 505 U.S. at 520 (plurality opinion).[5] The amendment did not, however, substantively change the smoking-and-health nexus of Section 1334(b). As noted in the plurality opinion in *Cipollone*, "the phrase 'relating to

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[5] See *Vango Media, Inc.* v. *City of New York*, 34 F.3d 68, 73-75 (2d Cir. 1994) (state law requiring a company that advertises cigarettes to make separate public service announcements concerning health effects of smoking is "with respect to" advertising, and therefore preempted).

smoking and health' * * * was essentially unchanged by the [amendment]." *Id.* at 529. Thus, like the original version of Section 1334(b), the amended version encompasses requirements that regulate the health messages in tobacco advertising, not ones that restrict advertising location.

Nothing in the legislative history of the amendments suggests that Congress intended to alter the preemption provision's health-message focus. The Senate Report states that the amendment merely "clarified" the original version of the preemption provision. S. Rep. No. 566, 91st Cong., 2d Sess. 12 (1969). The Senate Report further states that "[t]he state preemption of regulation or prohibition with respect to cigarette advertising is *narrowly phrased* to preempt only state action based on smoking and health." *Ibid.* (emphasis added). And the Report makes clear that the amendment "*would in no way affect the power of any state or political subdivision of any state with respect to* the taxation or *the sale of cigarettes to minors*, or the prohibition of smoking in public buildings, *or similar police regulations.*" *Ibid.* (emphasis added). Those statements support the authority of Massachusetts to restrict the location of outdoor advertising in order to help prevent the unlawful sale of cigarettes to minors. The Report also states that the preemption provision was intended to "avoid the chaos created by a multiplicity of *conflicting* [state or local] regulations," *id.* at 12, something that could not occur with respect to location restrictions. Several members of the Conference Committee described the preemption provision in comparably narrow terms.[6]

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[6] Representative Staggers stated that the bill "contains the preemption applicable to states and their political subdivisions in recognition of the fact that the labeling, advertising, promotion, and sale of cigarettes insofar as they are related to smoking and health are matters of national concern," and "makes clear that in order to make the legislation effective, States and their local divisions are not to interfere with the scheme of

F. The plurality's conclusion in *Cipollone* that common law claims based on fraudulent misrepresentation in advertising are not "based on smoking and health" is also instructive here. The plurality explained that the "central inquiry" in determining whether a common law claim is preempted is "whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health' * * *, giving that clause a fair but narrow reading." 505 U.S. at 523-524. Because the petitioner alleged that tobacco companies had made false representations of material fact or concealed material facts concerning the health consequences of smoking (see *id.* at 510, 528), his claims of fraudulent misrepresentation could have been viewed as falling within the text of Section 1334(b), at least if broadly construed. The plurality concluded, however, that those claims were not preempted because they were "predicated not on a duty 'based on smoking and health' but rather on a more general obligation —the duty not to deceive." *Id.* at 528-529. The Court found that interpretation of Section 1334(b) appropriate for a number of reasons: (1) there was no evidence that Congress intended to insulate cigarette manufacturers from longstanding rules governing fraud; (2) the legislative history showed that Congress intended for the terms "based on smoking and health" to be construed narrowly and not to reach traditional exercises of the police power; (3) state law prohibitions against fraud do not create "diverse, nonuniform, and confusing" standards; and (4) holding the claim preempted

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regulation provided for in the legislation." 116 Cong. Rec. 7920 (1970). Representative Satterfield similarly described the matters of national concern and explained that "state and local jurisdictions are not by regulation or prohibition to expand, duplicate, or change Federal regulation in any way or to reduce[] the legal or practical effectiveness of the warning statement imposed by section 4, or to otherwise interfere with this legislation." *Id.* at 7921; cf. Pet. App. 55a n.9 (discussing 116 Cong. Rec. 6640 (1970) (Sen. Magnuson)).

would conflict with the background presumption against preemption. *Id.* at 529 & nn.26, 27; see also *id.* at 530.

A similar analysis applies here. The Massachusetts regulations do not impose on petitioners any duties "based on smoking and health." Rather, they impose duties based on the location of the advertising.[7]

II. THE STATE'S ADVERTISING RESTRICTIONS DO NOT VIOLATE THE FIRST AMENDMENT

Petitioners argue that the State's restrictions on advertising near schools or playgrounds violate the First Amendment. Those restrictions, however, satisfy the established standards for judging the validity of restrictions on commercial speech. And petitioners have not offered a persuasive justification for departing from those standards here.

A. *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), sets forth the standards for evaluating the constitutionality of restrictions on commercial speech. Speech that concerns an unlawful activity or that is misleading is not protected by the First Amendment. To justify a restriction on speech that concerns a lawful activity and is not misleading, the State must show that (1) its asserted interests are substantial; (2) the restriction directly advances the interests; and (3) the restriction is not more extensive than is necessary to serve those interests. *Id.* at 566.

For purposes of its summary judgment motion, the State assumed arguendo that the speech at issue here concerns a lawful activity and is not misleading. To succeed on its summary judgment motion, the State was therefore required to

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[7] For many of the same reasons we have set forth, the court of appeals in this case held that the State's restrictions are not "with respect to * * * advertising" within the meaning of Section 1334(b). Pet. App. 9a-13a. While we share the court's view that the State's restrictions are not preempted, we believe that conclusion is more appropriately grounded in the preemption provision's "based on smoking and health" limitation.

satisfy its burden of justification on the other three inquiries. As we now show, the State satisfied its burden.

B. The interests asserted by the State are preventing unlawful sale and distribution of tobacco products to minors and protecting minors from the health consequences of tobacco use. Those interests are compelling. *Sable Communications of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989) (government has "compelling interest in protecting the physical and psychological well-being of minors"). Our perspective on that issue is shaped by the decades of study and evaluation by the Department of Health and Human Services, including the Surgeon General. Those consequences were most comprehensively explained by FDA, which, after the most extensive rulemaking in its history, found that petitioners manufacture a product that is both highly addictive and dangerous, particularly for children. In *Brown & Williamson*, *supra*, the Court held that FDA lacks authority to regulate tobacco products. It did not, however, call into question FDA's core findings. 529 U.S. at 125, 127-128, 134-135. To the contrary, the Court concluded that "[t]he agency has amply demonstrated that tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *Id.* at 161.

The agency's findings are worth repeating. FDA found that there is a consensus in the scientific community that the nicotine in tobacco is extraordinarily addictive. 61 Fed. Reg. 44,629 (1996). As many as 92% of all smokers are addicted to cigarettes. *Id.* at 44,730. Tobacco use is also the single leading cause of preventable death in the United States. *Id.* at 44,398. More than 400,000 deaths result each year from tobacco-related illnesses such as cancer, respiratory illnesses, and heart disease. *Ibid.* In addition, tobacco use is a "pediatric disease," *id.* at 44,421, because most people who use tobacco as adults began smoking regularly during childhood, *id.* at 44,399. The average age at which children try

their first cigarette is $14^{1/2}$, and 82% of adults who have ever smoked had their first cigarette before age 18. *Id.* at 45,239. If adolescents can be kept tobacco-free, few will start using tobacco as adults. Every year, however, approximately one million children begin to smoke, *id.* at 44,398, 44,568, and one of every three who become regular smokers will eventually die from a tobacco-related disease, *id.* at 44,399. The State therefore has vital interests in preventing children from becoming addicted to the dangerous product that petitioners manufacture.

C. The State's restrictions on advertising near schools and playgrounds are also "direct[ly] and material[ly]" related to its interests in preventing underage tobacco use. See *Edenfield* v. *Fane*, 507 U.S. 761, 770-771 (1993). As the court of appeals noted, the State submitted "[n]early two thousand pages of * * * reports and surveys by governmental, scientific, and academic entities" to support its conclusions that advertising significantly contributes to underage tobacco use and that the State's advertising restrictions will alleviate that harm to a material degree. Pet. App. 27a. The evidence compiled by FDA provides firm support for the State's conclusions.

FDA found that, in 1993 alone, the tobacco industry spent more than $6.1 billion to promote and advertise its products and that mass marketing of that magnitude creates an environment of "friendly familiarity" in which children view smoking as acceptable. 61 Fed. Reg. at 44,475. FDA also found that the tobacco industry uses advertising techniques that "associate the use of tobacco products with excitement, glamour, and independence," and that children are particularly "vulnerable" to those techniques. *Id.* at 44,398. FDA further found that "the pervasiveness and imagery used in industry advertising and promotional programs often obscure adolescent perceptions of the significance of the associated health risks and the strength of the addictive power of tobacco products." *Id.* at 44,571. FDA therefore

concluded that advertising plays a material role in the decision of children to smoke. *Id.* at 44,489.

FDA cited abundant evidence to support its findings. For example, the Surgeon General and the Institute of Medicine both concluded that advertising affects tobacco consumption by altering perceptions about the pervasiveness and social benefits of smoking. 61 Fed. Reg. at 44,487-44,489. The American Psychological Association similarly determined that tobacco advertisers use images that appeal to children's need to belong and to appear more grown up, a technique that effectively breaks down resistance to tobacco use. *Id.* at 44,488-44,489.

In addition, studies show that advertising plays a role in leading children to overestimate the prevalence of smoking and that those misperceptions are related to smoking initiation. 61 Fed. Reg. at 44,476. Studies also show that children who smoke are much more likely to recall tobacco advertising and that exposure to advertising is positively correlated with smoking behavior and intention to smoke. *Id.* at 44,475-44,476. Significantly, of the children who smoke, 86% use the three most heavily advertised brands, while adults more commonly use brands that are not advertised. *Id.* at 44,482.

The industry has acknowledged in its written documents that young people are a crucial segment of the tobacco market. 61 Fed. Reg. at 44,489. The reason is apparent. As explained by the Surgeon General, "[s]ince most smokers try their first cigarette before age 18, young people are the chief source of new consumers for the tobacco industry, which each year must replace the many consumers who quit smoking and the many who die from smoking-related diseases." J.A. 192. Internal RJR documents establish that there was a company policy to develop brands that would appeal to pre-smokers and learners aged 14-18. 61 Fed. Reg. at 44,480. RJR subsequently developed the Joe Camel cartoon campaign, and that campaign significantly affected youth smok-

ing rates. *Id.* at 44,476. Similarly, a marketing campaign directed to women resulted in a significant increase in smoking by young girls. *Ibid.*

It is also a matter of common sense that the expenditure of $6.1 billion on advertising and promotion would increase consumption of tobacco. The FDA quoted one "well-known advertising executive," who commented: "'I am always amused by the suggestion that advertising, a function that has been shown to increase consumption of virtually every other product, somehow miraculously fails to work for tobacco products.'" 61 Fed. Reg. at 44,494. Not surprisingly, studies show that when advertising restrictions have been enforced in other countries, tobacco use has declined. *Id.* at 44,490.

FDA found that advertising near schools and playgrounds poses special dangers because children are repeatedly and unavoidably exposed to advertising in those locations. 61 Fed. Reg. at 44,467. FDA identified areas within 1000 feet of a school or playground as places that should be free of advertising because those are the areas that children most often pass by on their way to schools and playgrounds and on their way home from those locations. *Id.* at 44,503. FDA also found that adolescents are likely to congregate around stores near schools and playgrounds and that the tobacco industry has attempted to exploit that fact. Stores within 1000 feet of a school had a significantly greater percentage of windows covered with tobacco signs than stores further away, and two RJR memos mention the importance of supplying stores near high schools with young adult materials. *Id.* at 44,504.[8]

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[8] Petitioners themselves have recognized the special impact of outdoor advertising because, as they acknowledge (Br. 46-47), petitioners have since 1990 refrained from placing advertising on billboards within 500 feet of schools. See Pet. App. 31a.

The cumulative force of that evidence overwhelmingly supports the State's judgment that tobacco advertising plays a significant role in the decision of children to smoke. See *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 626-629 (1995) (surveys and anecdotal evidence sufficient to support no-solicitation rule); cf. *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 195 (1997) (court in First Amendment case is limited to examining whether government drew reasonable inferences based on substantial evidence). Moreover, as this Court has repeatedly recognized, it is simply a matter of common sense that advertising increases demand for a product. *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 487 (1995); *United States* v. *Edge Broad. Co.*, 509 U.S. 418, 434 (1993); *Central Hudson*, 447 U.S. at 569.

Petitioners argue (Br. 43-44) that the restrictions at issue here will not materially advance the State's interests because the Master Settlement Agreement (MSA) between the States and a number of cigarette manufacturers already restricts outdoor advertising to some extent by barring petitioners from displaying advertising outdoors or on the inside surface of a window facing outward unless it occupies an area of 14 square feet or less. The MSA, however, applies only to the manufacturers who have signed it. It does not restrict advertising by other manufacturers or by any retailer. Moreover, the MSA does not apply to outdoor advertising at retail stores that falls within the 14-square-feet exemption. As discussed above, adolescents are repeatedly and unavoidably exposed to outside advertising at retail locations that are near schools and playgrounds. The recent practices of the tobacco industry illustrate the magnitude of that problem. Between 1998 and 1999 the tobacco industry increased spending on point-of-sale advertising by 13.3%, from $290.7 million to $329.4 million. FTC, *Cigarette Report for 1999*, at 4 (2001) (FTC Report). The State therefore had ample reason to conclude that the MSA is not

sufficient to serve its compelling interest in preventing underage tobacco use.

D. The State's advertising restrictions are also not "more extensive than is necessary to serve" its compelling interests. *Central Hudson*, 447 U.S. at 566. To satisfy that prong of the inquiry, the State need not show that it has chosen the "least restrictive means." Instead, it need only show that there is a "'fit' between the [government's] ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable." *Board of Trustees of the State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 480 (1989) (internal quotation marks and citation omitted). That standard is readily satisfied here. By placing restrictions on advertising within 1000 feet of schools and playgrounds, the State has carefully tailored its restrictions to the areas where children are most likely to be repeatedly and unavoidably exposed to tobacco advertising. See 21 U.S.C. 860 (mandating a 1000-foot drug-free zone around schools and playgrounds).

Petitioners argue (Br. 45) that the restrictions are not narrowly drawn because they prohibit outdoor advertising in 90% of the areas in the three largest cities in Massachusetts. That argument is unpersuasive.[9] In *Went For It*, the Court upheld a regulation that prohibits personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster. The Court rejected the contention that the regulation restricted communication too extensively, reasoning that lawyers could use television, radio, newspapers, billboards, untargeted letters, and the yellow pages to advertise their services. 515 U.S. at 634. The regulation therefore left

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[9] In *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490 (1981), seven Justices apparently were of the view that a city could entirely eliminate billboard advertising within its borders. See *id.* at 508-512 (plurality opinion); *id.* at 552-553 (Stevens, J., dissenting in part); *id.* at 559-561 (Burger, C.J., dissenting); *id.* at 570 (Rehnquist, J., dissenting).

"ample alternative channels for receipt of information about the availability of legal representation." *Ibid.* In *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 53-54 (1986), the Court upheld the constitutionality of a zoning ordinance that limited adult book stores to five per cent of the land area in the city. The Court explained that "the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement." *Id.* at 54.

Similarly here, even limiting the inquiry to the three largest cities, rather than to the State as a whole, petitioners have a variety of means to promote their products to adults. They can locate outdoor advertising in 10% of the areas in those cities, double the area available in Renton. Even more important, they can distribute information about their products through newspapers, magazines, direct mail, personal solicitation, promotions, and other means. Petitioners have not had difficulty exercising those options. Between 1998 and 1999, the cigarette industry's expenditures on advertising and promotion rose from $6.7 billion to $8.2 billion. FTC Report 16. The regulations therefore leave tobacco manufacturers with adequate opportunities to convey "information as to who is producing and selling what product, for what reason, and at what price" to adults who are interested in obtaining such information. *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976).

There also are not any "obvious less-burdensome alternatives to the restriction on commercial speech." *Went For It*, 515 U.S. at 632 (citation omitted). Petitioners argue (Br. 45) that the State should pursue its interests through more rigorous enforcement of its laws that prohibit retailers from selling tobacco products to children. The State submitted evidence, however, that it already has one of the most rigorous enforcement programs in the United States and

that too many children are still able to obtain access to tobacco products. J.A. 90-96.

The State's experience is not surprising. HHS has established 80% compliance with the prohibitions on sale of tobacco products to children as a realistic goal for States to strive to achieve. 61 Fed. Reg. 1499 (1996). Moreover, because many children obtain cigarettes from friends and relatives, J.A. 290, even perfect compliance with the prohibition on sales would not fully achieve the State's purposes. For those reasons, efforts to reduce the supply of tobacco products to children represent only a partial solution to the problem of underage tobacco use. Advertising restrictions complement efforts to reduce supply because they attack a problem that such enforcement efforts do not address—the demand for tobacco that advertising creates and nourishes in minors.

Petitioners also argue (Br. 45) that the State should make it unlawful for minors to purchase tobacco products. That alternative is not an "obvious less-burdensome alternativ[e]." *Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993). Turning children who purchase or obtain tobacco products into criminals raises sensitive policy issues, and States can reasonably view such an alternative as an unacceptable option. Moreover, like a prohibition on sale, a prohibition on the purchase of tobacco simply does not address the distinct problem posed by cigarette advertising —that it stimulates demand for the product.

Finally, in balancing the relevant considerations to assess whether the restrictions imposed by the Massachusetts regulations are more extensive than is called for to serve the State's compelling interests, it is surely relevant that (1) the sale of cigarettes to minors is unlawful and the commercial transactions proposed or promoted by cigarette advertising therefore are unlawful to that extent; (2) the effects of tobacco use on impressionable minors who may be induced to begin or continue smoking are profound and longlasting,

while the asserted benefits of outdoor advertising of cigarettes for petitioners and adult consumers are more fleeting and capable of being realized in other ways; (3) the great majority of adult tobacco users to whom the advertising may lawfully be directed are addicted to the product; and (4) the tobacco use promoted by petitioners' advertising is—particularly among children and adolescents but among adults as well—"perhaps the single most significant threat to public health in the United States." *Brown & Williamson*, 529 U.S. at 161. It therefore is especially appropriate to give the State full berth for the effectuation of its compelling interests served by the prohibition against cigarette advertising within 1000 feet of schools and playgrounds.[10]

E. Petitioners argue (Br. 26-41) that the Court should subject the State's restrictions to the same strict scrutiny standard that it applies to non-commercial speech that is "content" or "viewpoint" based. Petitioners' suggestion that the Court abandon the *Central Hudson* framework for evaluating restrictions on commercial speech should be rejected. *Central Hudson*'s middle-tier scrutiny strikes the

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[10] Petitioners' reliance (Br. 47-49) on *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983), and *Carey* v. *Population Services International*, 431 U.S. 678 (1977), is misplaced. In *Bolger*, the Court invalidated a statute prohibiting unsolicited mailed advertisements for contraceptives. The Court reasoned that parents exercise substantial control over their mailboxes and can prevent mailings from reaching their children through the "short, though regular, journey from mail box to trash can." 463 U.S. at 72-74 (citation omitted). In contrast, parents have no effective means to protect children on their way to schools and playgrounds from having outdoor advertising "thrust upon them by all the arts and devices that skill can produce." *Packer Corp.*, 285 U.S. at 110. In *Carey*, the Court invalidated a law that prohibited advertising concerning contraceptives. The Court explained that the law sought "to suppress completely" any information about the availability and price of "products and services that are not only entirely legal, but constitutionally protected." 431 U.S. at 700-701 (citation omitted). The State in this case does not seek to suppress completely any information about the availability and price of tobacco products, and there is no constitutional right to use tobacco products.

appropriate balance between a seller's interest in proposing a commercial transaction and the State's right to regulate speech that is intimately bound up with regulable economic activity. The application of *Central Hudson* has resulted in the invalidation of unnecessary restraints, while still giving government flexibility to protect consumers from economic activity that poses risks to public safety and health. Petitioners offer no persuasive reason for the Court to invalidate restrictions on commercial speech where the government can demonstrate that they directly and materially further substantial interests and are no more extensive than necessary to serve those interests.

Petitioners' proposal could also have far-reaching consequences. For example, if the state regulation at issue here must be subjected to strict scrutiny because it is "content based" and "viewpoint based," it is difficult to see why Congress's prohibition on cigarette advertising on television and radio should not be subjected to strict scrutiny. 15 U.S.C. 1335. Other federal statutory restrictions on commercial speech are also capable of being characterized as "content based" or "viewpoint based." See 15 U.S.C. 1336 (recognizing and preserving FTC authority with respect to unfair or deceptive acts or practices in cigarette advertising); 15 U.S.C. 1681 (limiting dissemination of credit reports); 15 U.S.C. 6501 (Supp. IV 1998) (implementing privacy protection provisions); 21 U.S.C. 343(r) (1994 & Supp. IV 1998) (authorizing FDA to place restrictions on labeling claims about nutrients). Petitioners' rule would also seemingly call for strict scrutiny of any restriction on the outdoor advertising of firearms within 1000 feet of a school or playground. This Court should reject a proposal that would so destabilize the law.

Some Members of this Court have suggested that a more searching scrutiny might be appropriate "when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preserva-

tion of a fair bargaining process." *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 501 (1996) (Stevens, J., joined by Kennedy and Ginsburg, J.J.). Laws meeting that description, however, can be fairly analyzed under the *Central Hudson* inquiry. There is no reason to add a new standard of review to judge such restraints. *Id.* at 532 (O'Connor, J., joined by Rehnquist, C.J. and Souter and Breyer, J.J., concurring in the judgment).

Even if such a rule were adopted, however, it would have no application in this case. The restrictions at issue here do not "entirely prohibit" the dissemination of information about tobacco. They apply only near schools and playgrounds, and petitioners have numerous alternative means to disseminate information about tobacco to adults. Nor are the State's reasons for imposing its restrictions unrelated to the preservation of a fair bargaining process. The State justifiably views any bargain between tobacco manufacturers and children as inherently unfair, both because the State has made the sale of tobacco products to children unlawful, cf. *Edge Broad. Co.*, 509 U.S. at 428, and because so many children lack the maturity in judgment to resist the tobacco industry's appeals to excitement, glamour, and independence, and to appreciate the addictive power and health risks of tobacco products, cf. *FTC* v. *Keppel & Bro.*, 291 U.S. 304, 309 (1934). The State's interest in preventing such unfairness is at its apex when the State seeks to limit tobacco advertising near schools and playgrounds, where children are repeatedly and unavoidably exposed to the advertising.

This is also not a case in which the government's asserted interest is to keep adults who may lawfully consume a product ignorant based on a paternalistic view that they will otherwise make irresponsible choices. See *44 Liquormart*, 517 U.S. at 518 (Thomas, J., concurring in part and concurring in the judgment). Children are not lawful consumers of tobacco, and the government has significant leeway to act

paternalistically when its goal is to protect children from making irresponsibly dangerous choices.

This case also does not remotely resemble the hypothetical prohibition on advertising that is demeaning to men discussed in *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 389 (1992). Such a statute would ordinarily have no plausible relationship to a State's interest in any underlying commercial transaction. Here, by contrast, the State's restrictions on tobacco advertising near schools and playgrounds is directly related to the State's interest in preventing the unlawful sale of tobacco products to children.

Finally, the application of strict scrutiny is particularly unwarranted here. Petitioners disclaim any First Amendment interest in persuading children to smoke or, for that matter, in persuading anyone who is not already smoking to smoke. Their sole professed interest is in persuading persons who already smoke to choose their brand rather than their competitor's. 61 Fed. Reg. at 44,494. There is no evidence, however, that the State is taking sides in that "debate" among competitors. Instead, the State's sole asserted interest is in preventing petitioners from (intentionally or unintentionally) persuading children to smoke a product that cannot lawfully be sold to them and that is likely to cause one out of every three who become addicted to it to die a premature death. The First Amendment does not prevent a State from sensibly pursuing that interest.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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